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MAYATHEVAN MAYANDI & ORS v. DR NAVIN KUMAR BATUMALAI & ORS

HIGH COURT MALAYA, MELAKA
MOHD FIRUZ JAFFRIL JC
[CIVIL SUIT NO: 22-111-07-2011]
30 JUNE 2015

B

TORT: *Damages – Assessment – Medical negligence – Child born with cerebral palsy – Whether plaintiffs entitled to special damages, pre-trial damages, general damages for pain and suffering and loss of amenities of life, and cost of future care – Whether Deputy Registrar ('DR') erred by relying on wrong multiplier when calculating third plaintiff's life expectancy – Whether DR erred in deducting two-thirds from multiplicand when assessing future medical expenses and non-medical related damages – Whether damages fair and adequate – Whether appellate intervention necessary – Civil Law Act 1956, ss. 11 & 28A(2)(i)*

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CIVIL PROCEDURE: *Interest – Discretion to award – Whether discretion properly exercised – Whether within permissible ambit of law – Civil Law Act 1956, s. 11*

The first and second plaintiffs, the parents of the third plaintiff, had filed an action in negligence against the first and second defendants. It was the plaintiffs' case that the medical negligence of the first and second defendants during the birth of the third plaintiff had resulted in the third plaintiff child suffering from a medical condition known as cerebral palsy. The plaintiffs also claimed that the third defendant was vicariously liable for the negligence of the first and second defendants. The defendants accepted liability and a consent judgment was entered with damages to be assessed by the Deputy Registrar ('DR'). At the end of the hearing, the DR awarded a sum of RM6,793,729.30 to the third plaintiff. Two appeals arose from this assessment. The plaintiffs appealed on the inadequacy of damages awarded while the defendants appealed against the excessiveness of damages awarded. The plaintiffs' appeal was based primarily on the fact that the DR had erred by relying on the wrong multiplier when calculating the third plaintiff's life expectancy and future damages, in deducting two-thirds from the multiplicand when assessing future medical expenses and non-medical related damages and by not awarding damages for respite care and holidays and for the third plaintiff's living expenses after she turned 18. The defendants challenged the DR's basis for arriving at the life expectancy period and multiplier and the quantum of damages given to the plaintiffs in respect of past expenses, pre-trial damages and future damages. The defendants also submitted that the DR had erred by awarding the plaintiffs damages they had not proven or did not deserve.

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Held (ordering variations to awards):

(1) The testimonies of both the plaintiffs' expert witness (SP6) and the defendants' expert witness (SD1) on the life expectancy were estimated on statistics compiled by European experts. There were no Malaysian

statistics on this subject matter. In the circumstances, the DR was wrong when she agreed with the submission of the plaintiffs that the testimony of SD1 should be viewed with caution as the latter was in a position of conflict of interest, in that he was providing purportedly independent expert testimony in favour of his own colleagues at the Ministry of Health. The DR should have viewed the testimony of SD1 objectively and not based on the fact that SD1 was employed by the third defendant. In fact, SD1 was giving evidence pursuant to O. 40A r. 2 of the Rules of Court 2012. As such, it was the duty of the expert to assist the court in arriving at a just decision where the evidence of the expert given should not only be independent but should also be seen to be independent. Upon reviewing the testimony of both experts on the issue of life expectancy, it was apparent that SD1's explanation was more reliable compared to that of SP6. In the above premise, the correct multiplier was 28 years based on the life expectancy as per the expert opinion of SD1. The plaintiffs' appeal that the proper life expectancy should be 74 years old was therefore dismissed. (paras 21-25)

(2) The plaintiffs' argument that the DR had erred in deducting two-thirds from the multiplicand when assessing future medical expenses and non-medical related damages was without merit. In the present case, although the treatment for the third plaintiff was available at government hospitals, her parents chose private hospitals. Based on the authorities cited it was clear that if the plaintiffs chose treatment at a private hospital, it was a matter of practice that only one third of the claim would be allowed. (para 34)

(3) On the issue of cost of special education, taking judicial notice of cases where the cost of future education was not awarded at all, and considering the evidence of the plaintiffs' witness, SP6, on how confident she was of the third plaintiff's potential capabilities and the fact that damages had been awarded for her transportation, the award of RM1,000 per month was reasonable. The multiplier was however varied from 47 years to 28 years. The total sum awarded was thus varied from RM480,000 to RM336,000. (paras 35-40)

(4) The DR had not erred in not awarding the third plaintiff's caregivers respite care or living expenses after the third plaintiff attained 18. There was no evidence on the medical condition of the first and second plaintiffs to ascertain as to who will be responsible to take care of the third plaintiff once she turned 18 years of age. Further, s. 28A(2)(c)(i) of the Civil Law Act 1956 ('CLA') applied. Since the third plaintiff was not an income earner prior to the negligence occurring, she was not entitled to such. (paras 50-52)

(5) There was no merit in the defendants' objection to the award of RM6,000 as special damages for the cost of therapies at the spastic schools. Although the plaintiffs could only furnish proof up to the amount of RM1,618, the DR was clearly right to allow for oral evidence apart from documentary evidence. The DR was also correct in allowing the plaintiffs' special damages claim of RM1,050 for Ayurvedic treatment as there was no evidence that such treatment was available in public hospitals. As for the amount awarded for the care of the third plaintiff by her mother, the amount awarded by the DR was varied from RM17,500 to RM10,500. The special damages awarded for the third plaintiff's nutrition was also varied from RM17,500 to RM8,750. (paras 57-74)

(6) Based on the evidence, there was no necessity for appellate intervention with regard to the DR's award of RM2,000 for medication, RM2,600 as the cost of home visit physiotherapy, RM23,100 for the cost of Ayurvedic therapy and RM82,191.60 for the cost of travelling. However, the cost of care by family members was varied from RM30,500 to RM24,400, the cost of nutrition varied from RM30,500 to RM21,350 and, by agreement, the hygiene expenses reduced from RM18,300 to RM10,455.40 per month. (paras 75-99)

(7) Where the defendants accepted the multiplicand but appealed only in regard to the multiplier, adjustments were made to the awards to reflect the new multiplier of 28 years. Thus, the following adjustments were made to the awards for the cost of future hospital admissions RM1,333 (RM4,000 x 1/3) x 28 years = RM37,324; the cost of future specialist consultations RM60 (RM180 x 1/3) x 9 times a year x 28 = RM15,120-40; the cost of future medication RM35 (100 x 1/3) x 12 x 28 = RM11,760; the cost of future complementary treatment of hypnotherapy and acupuncture RM400 x 12 x 28 = RM134,400 & for acupuncture RM600 x 28= RM16,800); the cost of future special education (the deduction of 2/3 remains for the reasons given in para. 40 above) RM1,000 (RM3,000 x 1/3) x 12 x 28 = RM336,000; and the cost of future assistive device from a lump sum of RM300,900 based on the multiplier of 40 years was reduced to RM231,500 based on a multiplier of 28 years. (paras 101 & 102)

(8) As for instances where the defendants appealed against both the multiplicand and the multiplier, no adjustments were made to the awards by the DR except for instances which involved a change in the multiplier. (paras 103-127)

(9) There was no merit in the defendants' objection to the DR's award in the sum of RM100,000 for the cost of purchasing a computer for the third plaintiff. However, due to the change of multiplier from 40 years to 28 years, and taking into account SP6's testimony, the award for this heading was reduced to RM50,000. (paras 128-132)

(10) The DR had exercised her discretion to award interest to the plaintiffs within the permissible ambit of the law on each of the categories awarded. In this regard, the 8% per annum on pre-trial damages and general damages for pain and suffering and loss of amenities of life from the date of service of writ to the date of judgment on liability was in line with s. 11 of the CLA. (paras 137 & 138)

Case(s) referred to:

A'aliyah Syahril Riza v. Government of Malaysia (Civil Appeal No. W-01-425-10-2012) (Unreported) CA ***(refd)***

ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd [2001] 8 CLJ 1 HC ***(refd)***

Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA ***(refd)***

Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal [2013] 8 CLJ 449 CA ***(foll)***

Hariesh Kumar Mutharagi v. Government of Malaysia & 5 Ors (Suit No. MT1-22-915-2006) (Unreported) HC ***(refd)***

Hawkins v. New Mendip Engineering Ltd [1966] 3 All ER 228 ***(refd)***

Inas Faiqah lwn. Kerajaan Malaysia dan 2 lagi (Guaman Sivil No. 21-229-2009) (Unreported) HC ***(refd)***

Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors [2015] 3 CLJ 153 CA ***(refd)***

Jamiah Holam v. Koon Yin [1982] 1 LNS 89 HC ***(refd)***

Kasirin Kasmani v. The Official Administrator & Anor [1991] 3 CLJ 2498; [1991] 2 CLJ (Rep) 800 HC ***(refd)***

Kerajaan Malaysia v. Azim Muzammil Iman (Civil Appeal No. W-01-152-11) (Unreported) CA ***(refd)***

Lim Poh Choo v. Camden and Islington Area Health Authority [1979] 2 All ER 910 ***(refd)***

Mahamad Mahamad Said & Anor v. Perianayagam & Anor [1971] 1 LNS 71 FC ***(refd)***

Muhammad Akmal Muammar v. Kerajaan Malaysia (Suit No. MT2-21-241-2007) (Unreported) HC ***(refd)***

Muhammad Yassien bin Zuliskandar & 2 lagi lwn. Kerajaan Malaysia & 3 orang lagi (Guaman Sivil No: 22-763-2008) (Unreported) ***(refd)***

Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825 HC ***(refd)***

Peters v. Esat Midlands Strategic Health Authority and Others [2009] LS Law Med 229 ***(refd)***

Sam Wun Hoong v. Kader Ibramshah [1981] 1 LNS 103 FC ***(refd)***

Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor [2012] 3 CLJ 450 CA ***(refd)***

Schrump Et Al v. Koot Et Al Lexsee 18 OR (2D) 337 ***(refd)***

Tan Kuan Yau v. Suhindrimani Angasamy [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 FC ***(refd)***

Thiya Ruban Thyagarajan v. Kerajaan Malaysia (Civil Suit No. 21-170-05) (Unreported) HC ***(refd)***

Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC ***(refd)***

Legislation referred to:

Civil Law Act 1956, ss. 11, 28A(2)(c)(i)
Federal Constitution, arts. 74, 75, 76, 77
Rules of Court 2012, O. 40A r. 2

Other source(s) referred to:
Lim Heng Seng, *Assessment of Damages in Personal Injuries and Fatal Accident Claims: Principles and Practice*, pp 87 to 91

For the plaintiffs - PS Ranjan (Rama Tharini with him); M/s PS Ranjan & Co
For the defendants - Muzila Mohamed Arsad; SFC

Reported by Vani Krishnan

JUDGMENT

Mohd Firuz Jaffril JC:

[1] There are two appeals before me in this matter. Both are appeals on the decision of the Deputy Registrar dated 23 October 2014 in respect of assessment of damages:

(a) enclosure (85): the plaintiffs' appeal on the inadequacy of damages awarded; and

(b) enclosure (93): the defendants' appeal against the excessiveness of damages awarded.

Brief Facts

[2] The third plaintiff ("Rohgetana") was born on 19 November 2006 at the Melaka General Hospital. Negligence occurred during her birth, which resulted in brain damage to her. Consequently, she suffers from a medical condition known as cerebral palsy.

[3] The plaintiffs herein filed a claim for damages which allegedly accrued due to the medical negligence of the first and second defendants. The third defendant was alleged to be vicariously liable for the negligence of the first and second defendants. On 1 March 2013, a consent judgment in respect of liability was entered into. The case was then fixed for assessment before the Deputy Registrar.

[4] The hearing for assessment of damages took a period of six days and was conducted between 15 July 2013 and 13 March 2014, a period of seven months. In all the plaintiffs called eight witnesses whilst the defendants called only two witnesses.

[5] At the end of the hearing, the Deputy Registrar awarded a sum of RM6,793,729.30 to Rohgetana. No damages were awarded to the first plaintiff. The breakdown of her decision is summarized in the following table. Both parties have since appealed against the decision, hence the appeal before me.

[6] The appeal by the plaintiffs is only in respect of the award given to Rohgetana. The father's claim (the first plaintiff) was abandoned by non inclusion in the notice of appeal to the judge in chambers. The mother's claim although included in the notice of appeal to the judge in chambers

(item 4.3) was not pursued based on the submissions of the plaintiffs' counsel. Item 2.9 of the notice of appeal to the judge in chambers is also not pursued (cost of assistive devices).

Legal Position

[7] In considering this appeal, I am guided by the decision of Raja Azlan Shah CJ (as he then was) in the case of *Yang Salbiah & Another v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292,where the Federal Court held that in awarding damages for injury arising from negligence, the plaintiff is entitled to special damages, pre-trial damages, general damages for pain and suffering and the loss of the amenities of life, and cost of future care. "… the purpose of damages is to try, so far humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive ...". It must be to compensate the plaintiff and not to punish the defendant.

[8] In claiming special damages, such claim must be pleaded, particularised and proved be it by oral or documentary evidence (see *ABDA Airfreight Sdn Bhd v. Sistem Penerbangan Malaysia Bhd* [2001] 8 CLJ 1). The burden of proof based on the balance of probabilities lies on the plaintiff as held in *Sam Wun Hoong v. Kader Ibramshah* [1981] 1 LNS 103; [1981] 1 MLJ 295 and in *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* [2012] 3 CLJ 450; [2012] 4 MLJ 548. The plaintiff also has a duty to mitigate damages.

[9] It is also trite law that appellate intervention in relation to the issue of assessment of damages is warranted when it is proven that the damages awarded are:

(a) extremely inconsistent with discernible trend;

(b) made in error upon acting on the wrong principle of law; and

(c) based on a misapprehension of acts that led to an erroneous estimate.

See: *Mahamad Mahamad Said & Anor v. Perianayagam & Anor* [1971] 1 LNS 71; [1972] 1 MLJ 67, *Tan Kuan Yau v. Suhindrimani Angasamy* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323; [1985] 2 MLJ 22 and *Jamiah Holam v. Koon Yin* [1982] 1 LNS 89; [1983] 1 MLJ 103.

Summary Of The Plaintiffs' Appeal

[10] The core issues relating to plaintiffs' appeal are:

(a) The erroneous estimate of the Rohgetana's life expectancy (multiplier)

There are seven head of damages under this category where the plaintiffs accept the multiplicands but are appealing on the multiplier.

(b) Multiplier and multiplicand in respect of future damages

There are six heads of damages under this category.

(c) The Deputy Registrar's error in deducting 2/3 from the multiplicand

(d) Damages which were not awarded

This category concerns:

(i) respite care and holidays; and

(ii) living expenses after attaining the age of 18 years.

Summary Of The Defendants' Appeal

[11] The core issues relating to the defendants' appeal are:

(a) the issue of life expectancy period and multiplier (as in the plaintiffs' appeal);

(b) quantum of damages given to the plaintiffs in respect of:

(i) past expenses;

(ii) pre trial damages;

(iii) damages

(c) appeal on future damages; and

(d) awards which the plaintiffs does not deserve.

[12] Although the headings of the issues in both appeals are different, in essence they are very much intertwined. Nonetheless, for purposes of brevity and a clearer understanding of the rationale of my grounds, I shall deal with each appeal separately.

Plaintiffs' Appeal On The Issue Of Life Expentacy (Multiplier)

[13] Based on the expert evidence available before her, the Deputy Registrar assessed that the Rohgetana is likely to live until she is 64 years old.

[14] Both the plaintiffs and the defendants have cross dispute on this issue. The plaintiffs contends that based on the testimony of SP6 (associate Professor Dr Lydia Abdul Latif), Rohgetana's life expectancy is assessed to be in the range of 64 to 74 years. Her opinion was based on Hutton & Pharoah 2005 estimation as well as that of Strauss 2008 estimation of life expectancy (additional years) by age and cohort.

[15] The plaintiffs submit that the Deputy Registrar's decision in using the lower end range is an error in principle. For purposes of compensation, the benefit of the doubt should be given to the victim and not the tortfeasor. If the life expectancy is assessed at the lower end of the range and the victim lives until the higher end of the range, the victim will not have sufficient funds for her future needs. On this point counsel for the plaintiffs' referred the court to the following cases:

(a) *Hawkins v. New Mendip Engineering Ltd* [1996] 3 All ER 228

(b) *Schrump Et Al v. Koot Et Al Lexsee* 18 OR (2D) 337

(c) *Peters v. Esat Midlands Strategic Health Authority and Others* [2009] LS Law Med 229

(d) *Lim Poh Choo v. Camden and Islington Area Health Authority* [1979] 2 All ER 910

[16] Based on the above the multiplier in Roghetana's case should be 47 years, calculated as follows:

Life expectancy	74 years
Age at date of Deputy Registrar's decision	7 years
Remaining life expectancy	67 years
Deduct 30%	46.9 years
Number of years round up	47 years

[17] Contrary to the submission of the plaintiffs, the Senior Federal Counsel ("SFC") for the defendants submitted that more often than not the multiplier used in court for cases similar to Rohgetana's case is between 20 to 25 years. This multiplier is based on evidence of experts given in court on the issue of life expectancy. The multiplier used in passed decided cases should be used as guidance and urged this court to refer to the following cases:

(a) *Kerajaan Malaysia v. Azim Muzammil Iman* - Court of Appeal Order dated 27 Oct 2001 *via* Civil Appeal No. W-01-152-11 (agreed multiplier of 25);

(b) *Muhammad Akmal Muammar v. Kerajaan Malaysia* - Shah Alam High Court Order dated 18 Nov 2011 *via* Suit No. MT2-21-241-2007 (agreed multiplier of 24); and

(c) *Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors* [2015] 3 CLJ 153 - Court of Appeal decision dated 13 January 2015 *via* Appeal No. B-01-200-05-2013 (agreed multiplier of 24).

[18] To the contrary, the evidence given by the defendants' expert, SD1 (Dr Khoo Teik Beng) was that Rohgetana's life expectancy is 50 years old and not between 64 to 74 years as opined by SP6.

[19] SD1 gave a thorough explanation as to how he derived the life expectancy of 50 years. SD1 said that he could not understand the estimation given by SP6 wherein she testified as follows:

> As based on Strauss 2008 estimation of life expectancy (additional years) by age and cohort Rohgetana will be in the group of Rolls/Sit, cannot walk. Will be between 45 + 22 till 45 + 29 ...

[20] The testimony of SD1 is re-produced in verbatim below:

> Memang agak susah untuk kami buat anggaran life expectancy, tapi berdasarkan article oleh Strauss pada 2008, anggaran ini boleh dibuat berdasarkan kepada beberapa faktor, iaitu termasuk jantina, umur semasa dinilai tahap kefungsian pergerakan kasar dan juga cara pesakit diberikan makan. Rujuk kepada table 1 m/surat 489 Strauss 2008, walaupun plaintif semasa buat penilaian umur 9 tahun 5 bulan, kita beranggapan penilaian adalah semasa umur 15 tahun, di mana beliau masih rolls and sit and can't walk, dan tahap perlu diberikan makan, maka life expectancy, 15 + 35 menjadi 50 tahun. Ini merupakan jangka hayat yang boleh saya jangkakan berdasarkan journal ini ...
>
> ... Kalau berdasarkan Strauss yang diberikan oleh Dr Lydia, saya tidak berapa faham anggaran yang diberikan oleh Dr Lydia. Umur yang kami perlu gunakan adalah umur paling dekat dengan plaintif pada masa sekarang.

At p. 23, during severe cross examination by the plaintiffs' counsel, SD1 was asked to look at Dr Lydia's report, where she had explained how she came up with her estimation. She had referred to two pieces of literature ... "Is it wrong to refer to two pieces of literature?". SD1 answered as follows:

> Not wrong but I think Strauss is more appropriate. Hutton is an accepted literature. If you look at Dr Lydia's report at Table 1, it is a wrong way of calculating.
>
> We are assuming that she is starting at 15. Strauss is the latest and the nearest that we had.

During re-examination, SD1 reiterated that Dr Lydia interpreted the issue of life expectancy wrongly and that Hutton is not appropriate because they do not emphasis on added years.

Note: Dr Lydia had used the age of 45 years in the category of sit and rolls in assessing the life expectancy of Rohgetana. This is where she differed from SD1 who used the age of 15 years which is the closest in the Strauss table to Rohgetana's age.

[21] In deciding that the appropriate life expectancy is 64, the Deputy Registrar took into account the following factors:

(a) she agrees with the plaintiffs' submission that the evidence given by SD1 should be viewed with caution as SD1 had the interest of his employers namely the Ministry of Health to protect;

(b) SD1 said that his estimation of Rohgetana's life expectancy at 50 was due to her inability to self-feed. However, SD2 (Puan Lina Alias) said that Rohgetana was able to self-feed with minimal help (note: SD1 was of the view that Rohgetana was not able to feed herself independently without assistance from others-emphasis is mine);

(c) both experts SP6 and SD1 agreed that the life expectancy of Rohgetana will increase if given a good proper care; and

(d) the Deputy Registrar also decided to use her own assessment of Roghetana's development which she was able to view with her own eyes over the period of seven months the assessment proceedings was carried out.

[22] Upon perusing the evidence on this issue, I am unable to agree with the finding of the Deputy Registrar on this issue of life expectancy. My reasons are as follows:

(a) the testimony given by both SP6 and D1 on the life expectancy were estimates based on statistics compiled by European experts. There are no Malaysian statistics on this subject matter;

(b) the Deputy Registrar was wrong when she agreed with the submission of the plaintiffs that the testimony of SD1 should be viewed with caution as SD1 was in a position of conflict of interest, in that he was providing purportedly independent expert testimony in favor of his own colleagues at the Ministry of Health. This was in view of the Guidelines issued by the Malaysian Medical Council which states that "A practitioner involved in the management of the patient or working in the same healthcare facility or Ministry as the doctor in the inquiry should not appear as a witness in such inquiry";

(c) the Deputy Registrar should have viewed the testimony of SD1 objectively and not based on the fact that SD1 was employed by the third defendant. If such a test was to be applied, a similar analogy can be used as against the experts witnesses who testified for the plaintiffs' namely SP6 (Dr. Lydia) and SP8 (Dr. Bains), both whom have testified in a number of cases where Messrs PS Ranjan were solicitors for the plaintiffs including in the cases stated below which were part of the defendants' bundle of authorities:

(i) Mahkamah Tinggi Malaya di Johor Bahru Guaman Sivil No. 22-763-2008: *Muhammad Yassien Zuliskandar & 2 lagi lwn. Kerajaan Malaysia & 3 orang lagi*;

(ii) *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825; and

(iii) Mahkamah Tinggi Malaya di Shah Alam Guaman Sivil No. 21-229-2009: *Inas Faiqah lwn. Kerajaan Malaysia dan 2 lagi*

(d) SD1 was giving evidence pursuant to O. 40A r. 2 Rules of Court 2012. This means that it is the duty of the expert to assist the court in arriving at a just decision. This duty overrides any obligation to the party to whom the expert has received instructions or by whom he or she is paid. Therefore, the evidence of the expert must not only be independent but should also be seen to be independent.

[23] Having reviewed the testimony of both SP6 and SD1 on the issue of life expectancy, I am of the view that SD1's explanation as re-produced earlier at paras. 19 and 20 above is more reliable compared to that of SP6.

[24] In the above premise, it is my finding that the correct multiplier is 28 years based on the life expectancy as per the expert opinion of SD1:

Life expectancy	50 years
Age now	8 years
Remaining life expectancy	42 years
Deduct 1/3	14 years
Number of years round up	28 years

[25] The plaintiffs' appeal that the proper life expectancy should be 74 years old is therefore dismissed.

Multiplier And Multiplicand In Respect Of Future Damages

[26] This ground of appeal concerns the cost of future medical expenses in relation to:

(a) hospitalisation and clinics;

(b) specialist consultations; and

(c) medication

[27] The plaintiffs accept the Deputy Registrar's assessment of the yearly cost for the above head of damages with the exception against the award of 1/3 of the cost. The appeal on this issue is only for future medical expenses and not past medical expenses.

[28] The defendants on the other hand disagree with the assessment by the Deputy Registrar as a whole, both for past and future medical expenses.

[29] For purposes of convenience, the award given by the Deputy Registrar as compared to that appealed by the plaintiffs and defendants are set out below.

[30] It is the contention of the plaintiffs that the Deputy Registrar erred in awarding only 1/3 of the costs for four heads of damages instead of full cost. This means that there was an erroneous deduction of 2/3 which was made in reliance of an *obiter dicta* in the Court of Appeal case of *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321; [2004] 2 MLJ 465. The plaintiffs further contended *Chai Yee Chong* (*supra*) concerns past medical expenses. Yet the Deputy Registrar applied the same *obiter dicta* to future medical expenses and non-medical related damages as well.

[31] Specifically on the issue of future medical expenses the plaintiffs states that the Deputy Registrar misunderstood the Court of Appeal decision in *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal*

[2013] 8 CLJ 449; [2013] 4 MLJ 785 which had extended the principle in *Chai Yee Chong* to apply also to future medical expenses, whereas the *Gleneagles* case did not do so.

[32] It was the plaintiffs' submission that no deductions should be made for the cost of medical treatment in the future and that cost ought to be calculated by reference to market rates and not public healthcare rates which are heavily subsidised by the taxpayer. It was therefore, not reasonable to expect Rohgetana to attend public hospitals in future for her treatment and rehabilitation. The award of damages should be done by reference to proper and reasonable cost of supplying that need and not by way of expectation that the Government would give to her the kind of benefits in kind in the future. The court must therefore award in full compensation to Rohgetana and if she needs treatment in a Government hospital, it must be paid for out of the compensation sum. The plaintiffs repeatedly submit that the healthcare services provided by the Government should not be misused for the benefit of the tortfeasors.

[33] Additionally, the plaintiffs submitted that based on the evidence adduced it is not reasonable to expect Rohgetana to go to public hospitals for medical treatment in the future due to the following reasons:

(a) there are insufficient resources in Government hospitals to cater for Rohgetana's intensive rehabilitation needs, resulting in long waits, infrequent appointments and a lack of continuity of treatment;

(See notes of proceedings pp. 15, 16, 109 & 148 and the notes of proceedings 18 July 2014 pp. 37 & 38)

(b) the parents are unable to take Rohgetana to Government hospitals during office hours due to work commitments; and

(c) the standard of care and treatment received by Rohgetana at Government hospitals have shown to be lower than the standard of care expected of such hospitals;

(See: notes of proceedings 18 July 2014 pp. 36 & 37)

[34] Having reviewed both the cases of *Chai Yee Chong* and *Gleneagles*, my view is as follows:

(a) the decision in *Chai Yee Chong* only concerned past medical expenses. The principle therein is that, if the court was not satisfied that the plaintiff was justified in seeking treatment at a private hospital (if the particular treatment was not available at the government hospital or the treatment was available but not within a reasonable time or the treatment was grossly inadequate), the court should either dismiss the claim altogether or award an amount not exceeding one third of the expense. If it was shown that even one third was excessive, an amount less than one third may be awarded. However, in the event the plaintiff

succeeds proving that the amount incurred in the private hospital was reasonable, the court may award what it considered to be reasonable which may even be the full amount claimed;

(b) in *Gleneagles*, the Court of Appeal had to deal with the issue of both past and future medical expenses. There, the father (SP2) testified that he had registered baby Samantha as an OKU and as an OKU, Samantha is entitled to free treatment at government hospitals (same as in Rohgetana's case). Samantha had in fact used government health care services. However, SP2 said he chose not to go to government hospitals because of the long waiting list and appointment dates. The reason is thus one of convenience and not because the treatment required by Samantha is not available at the government hospital or the treatment provided at the government hospital is grossly inadequate. The Court of Appeal went on to reduce the award by the High Court which included award for future damages by 30%. Nonetheless, at para. 42 of the report, the Court of Appeal stated as follows:

> We accept that due to the long waiting list at the government hospital, the plaintiffs may choose to go to the private hospital if an urgent treatment is required. In accord with the authorities, if the plaintiffs choose treatment at a private hospital, it is a matter of practice that only one third of the claim will be allowed (*Chai Yee Chong v. Lew Thai* [2004] 2 MLJ 465; [2004] 2 CLJ 321). Hence, we agree with the appellants that the plaintiffs ought not to have been awarded the full costs of a private hospital.

(c) the reason given by baby Samantha's father for choosing private hospitals instead of government hospital in *Gleneagles* is similar to the reasons given by Rohgetana's parents. Here, despite the plaintiffs own witness, SP6 testifying that the treatment for Rohgetana is available at government hospital, the parents chose private hospitals. Using the same analogy, I therefore maintain the award of one third of the cost given by the Deputy Registrar.

The Plaintiffs' Appeal On One Other Mutiplicand

[35] The Deputy Registrar had accepted that the cost of special education for Rohgetana amount to RM3,000 per month. However, a deduction of 2/3 was made out of this cost, leaving a sum of RM1,000 only. According to the plaintiffs, the above exercise appears to be an extension of the *obiter dicta* in *Chai Yee Chong*'s case (*supra*) to non medical expenses as well as for future non medical expenses. No evidence was led regarding the availability of such special education at a location that is reasonably convenient for Roghetana.

[36] Against all the above contention on the issue of multiplier and multiplicand the defendants submitted as follows:

(a) the decision of the Deputy Registrar to award 1/3 of the cost based on the principle in *Chai Yew Chong* (*supra*) is correct;

(b) the plaintiffs' have a duty to mitigate damages as held in *Kasirin Kasmani v. The Official Administrator & Anor* [1991] 3 CLJ 2498; [1991] 2 CLJ (Rep) 800. This existence of this duty to mitigate can also be seen in the case of *Gleneagles Hospital (KL) Sdn Bhd v. Chung Chu Yin & Ors And Another Appeal* (*supra*);

(c) based on the current trend of medical negligence cases in Malaysia, the courts are only awarding part of the treatment cost in private hospitals as government hospitals do provide free treatment or that which is much cheaper;

(d) it is the Federal Government policy to provide health services by virtue of sch. 9 of the Federal Constitution (arts. 74 to 77). Such a policy cannot be altered according to whims and fancies. The health services provided by the government is improving from time to time; and

(e) the case of *Lim Poh Choo* (*supra*) relied by the plaintiffs was a claim for additional damages due to existence of new facts. The burden of proving that such a condition is detrimental to Rohgetana must be proven based on the balance of probabilities. The award must be one that is reasonable. It is not to enrich the plaintiffs.

[37] It was the submission of the defendants that the award by the Deputy Registrar in awarding 1/3 of the cost is correct with the caveat that the correct multiplier should be 28 and not 40 years.

[38] On the issue of cost of special education, the defendants submit that the plaintiffs have the choice of sending Rohgetana either to a government school or to a private school. In light of the fact that the plaintiffs have a duty to mitigate damages, the principle in *Chai Yee Chong*'s case applies.

[39] The defendants are also appealing on the multiplier of 40 years which is used by the Deputy Registrar in awarding the sum of RM480,000 to Rohgetana.

[40] In deciding on this issue, I take judicial notice of cases where the cost of future education is not awarded at all. Be that at it many, looking at the progress of Rohgetana and how confident SP6 is of her potential capabilities and the fact that damages has been awarded for her transportation, I am of the view that the award of RM1,000 per month is reasonable. The multiplier is however varied from 47 years to 28 years. The total sum awarded is thus varied from RM480,000 to RM336,000.

The Plaintiffs' Appeal On Damages That Were Not Awarded

[41] As stated in para. 10 above, the plaintiffs are also appealing on two heads of damages which were denied to Rohgetana by the learned Deputy Registrar:

(a) respite care and holiday; and

(b) living expenses after 18 years at RM3,000 per month.

[42] The first plaintiff gave evidence that he spent up to RM20,000 per year for holidays to have respite from the stress of caring for Rohgetana. This need for respite was supported by SP6 as caring for a child with cerebral palsy is very stressful and the care person need to maintain their own health so as to provide better care for the child.

[43] The plaintiffs submits that a modest sum of RM5,000 a year should be awarded. Times against the multiplier of 47 years, the amount that should be awarded is RM235,000.

[44] Court orders on this point, were also furnished to the court namely the case of *A'aliyah binti Syahril Riza v. Government of Malaysia* (Court of Appeal Civil appeal No. W-01-425-10-2012) and *Hariesh Kumar s/o Mutharagi v. Government of Malaysia & 5 Ors* (Johor Bahru High Court Suit No. MT1-22-915-2006).

[45] As to living expenses after the age of 18, it was submitted that if Rohgetana was a normal person, she would go on to work and earn her own keep. She would also probably contribute money to her parents. Not only are her parents deprived of this benefit, they are burdened with having to care for her for the rest of her life. The parents should not be made to bear this burden. It was suggested that a sum of RM3,000 per month is reasonable. Therefore based on the following formula, an award of RM3,000 x 39 years = RM1,404,000 should be given to Rohgetana:

Life expectancy	=	74 years
Less 18 years	=	56 years
Less 30%	=	39.2 (39)

[46] The case of *Gleneagles Hospital (KL) Sdn Bhd (supra)* and *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors* [2015] 1 CLJ 825 were also furnished to me.

[47] In contrast, the defendants submit that respite care does not exist in Malaysia. The award to hire a maid should be able to relieve the burden to care for Rohgetana. Furthermore, despite having an obligation as a mother to care for her own child, damages towards cost of care, has been awarded. The award to purchase equipment for Rohgetana's use should be able to ease such burden.

[48] The court orders referred to in *A'aliyah* and *Hariesh Kumar* (*supra*) were based on agreement of parties at the trial and a consent judgment. Interestingly, the Court of Appeal in *Inas Faiqah Mohd Helmi v. Kerajaan Malaysia & Ors [2015] 3 CLJ 153* (Civil Appeal No. B-01-200-05-2013) [2015] 3 CLJ 153 upheld the decision of the Shah Alam High Court not to award respite care to the plaintiff therein.

[49] The defendants were of the view that holiday is a family recreational activity regardless of whether Rohgetana is a cerebral palsy child or not. The award given to Rohgetana which includes maid and equipment to assist her movements will ease the manner in caring for her.

[50] On the issue of living expenses after Rohgetana attains the age of 18 years, there was no evidence on the medical condition of the first and second plaintiffs to ascertain as to whom will be responsible to take care of Rohgetana once she attains 18 years of age. Furthermore, s. 28A(2)(i) of the Civil Law Act 1956 applies. Since Rohgetana was not an income earner prior to the negligence occurring, she is not entitled to such.

[51] In addition, Disabled Persons Act 2008 also exists to protect handicapped persons. The award given had taken all of Roghetana's future needs for her entire lifetime. The Court of Appeal had refused a request for such an award the case of *Inas Faiqah* (*supra*).

[52] On this point, I take note that the Federal Court also dismissed a claim under the same heading in the *Gleneagle*'s case on 7 August 2014 *via* case number W-02-2662-10-2011 and W-02-2661-10-2011. I have also read the decision in *Inas Faiqah*'s case. I therefore agree with the decision of the Deputy Registrar not to award damages under this heading.

Other Issues Raised Solely In The Defendants' Appeal

[53] As a preliminary point, the defendants appealed against the ruling of the Deputy Registrar in disallowing the defendants to introduce documents contained in the 'Ikatan Dokumen Tambahan Defendan-Defendan' which related to the Shah Alam High Court Civil Suit No. 21-170-05: *Thiya Ruban a/l Thyagarajan v. Kerajaan Malaysia*. The additional bundle contained all pleadings and documents related to the case.

[54] The contention sought was that despite an award of damages by the court based on the life expectancy estimated by the experts there is still a chance that the victim would pass away before reaching the estimated life expectancy. Deputy Registrar ruled that the above additional bundle which was related to another case was inadmissible on grounds of relevancy.

[55] I am of the view that the decision of the Deputy Registrar on this issue is correct. This contention is already recognised medically and also by law. This is the very reason for reducing the award for future damages by 30% in an assessment for damages ie, to cater for contingencies which also include early demise. In any event, the defendants had also furnished the court with the High Court Order for *Thiya Ruban*'s case in their Bundle of Authorities, which this court takes judicial notice of the contents thereof.

Heads Of Damages Under The Defendants' Appeal

[56] For purposes of convenience, the defendants' appeal is divided into three headings:

A (i) Special damages;

(ii) Pre-Trial damages; and

(iii) Future damages

(i) Special Damages

B **[57]** With reference to special damages, the defendants' appeal is further divided into the following categories namely:

(a) the cost of therapies at the spastic school;

(b) the cost of Ayurvedic therapy;

C (c) the cost of care provided by family members; and

(d) the cost of added nutrition.

The Cost Of Therapies At The Spastic School

D **[58]** The Deputy Registrar awarded RM6000 for the cost of therapies undertaken at the Spastic School in Johor Bahru during the special damages period (ie, from the date the negligence occurred to the date the writ was filed amounting to two years, ten months and 11 days = 35 months. The calculation for this period was agreed by both parties).

E **[59]** Rohgetana began this treatment when she was ten months old. The cost for each session was RM20 per session. Therefore, three times per week x 25 months in total add up to RM6,000.

[60] The defendants were of the view that based on the receipts furnished F by the plaintiffs (see bundle C pp. 2 to 8 and bundle H pp. 67 to 68), the plaintiffs only expended a sum of RM1,618. According to the SFC, the burden of proof in a claim for special damages lies on the plaintiffs based the balance of probability as held in *Sam Wun Hoong v. Kader Ibramshah* (*supra*) and *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* (*supra*).Hence as the plaintiffs could only furnish proof up to the amount of RM1618, the G award by the Deputy Registrar is wrong.

[61] I am of the view that the decision in *ABDA Airfreight Sdn Bhd*(*supra*) which was relied upon by the Deputy Registrar clearly allows for oral evidence apart from documentary evidence. I therefore, dismiss the defendants appeal on this ground. H

Ayurvedic Treatment

[62] The cost for this treatment was RM30 per session. Rohgetana only went for one session per month for 35 month which amounted to RM1,050. The Deputy Registrar allowed the plaintiffs' claim for the sum of RM1050. I

[63] In appealing on this award of damages, the defendants submitted that the principle in *Chai Yee Chong*'s case applies, whereby only 1/3 of the costs should be awarded to the plaintiffs.

[64] I cannot agree with the defendants' stand on this issue as there is no evidence that Ayurvedic treatment is available in public hospitals. Therefore I dismiss the defendants' appeal against this award.

Care By Family

[65] A sum of RM500 per month was awarded by the Deputy Registrar for the cost of care provided to Rohgetana by family members during the 35 month special damage period. The total sum awarded here is RM500 x 35 month= RM17,500.

[66] The defendants were of the view that plaintiffs do not deserve such an award for the following reasons:

(i) Rohgetana's mother (the second plaintiff as well as SP5 in this case), was a full time housewife even before Rohgetana was born;

(ii) SP5 failed to show that there was extreme difficulty in taking care of Rohgetana compared to the caring of her second child which is normal. In other words, even Rohgetana was a normal child, SP5 would still have to care for her;

(iii) the fact that SP2 (the first plaintiff's mother) agreed to take care of Rohgetana from time to time was a matter of her own choice as well as that of the first and second plaintiffs; and

(iv) the plaintiffs had failed to plead this claim specifically. The plaintiffs also failed to prove that monies were paid to SP2 and Rohgetana's aunt who assisted to take care of her.

[67] The learned SFC referred me to the case of *Inas Faiqah* (*supra*). There the Court of Appeal *inter alia* upheld the High Court's decision not to award damages for care by family during the special damages period on the rationale that the care required by a handicapped child during such period is not more than that of a normal child.

[68] In the alternative, the defendants proposed that a sum of RM200 per month is reasonable.

[69] From my understanding, the law does allow for compensation in respect of gratuitous care as long as the amount to be awarded should be based on "the proper and reasonable cost" of such services. Such a claim was allowed in case of *Nurul Husna* (*supra*).

[70] During this 35 month special damage period, Rohgetana was still a toddler and as such, the care given to her will not be slightly more than that of a normal child. Bearing in mind that her mother was not working, I am of the view that an amount of RM300 per month is reasonable. The amount awarded by the Deputy Registrar is varied from RM17,500 to RM10,500.

Nutrition

[71] The Deputy Registrar awarded a sum of RM500 per month for nutrition which adds up to RM17,500 (RM500 x 35 months).

[72] Relying mainly on the case of *Inas Faiqah* (*supra*) where no award was given for nutrition during the period of special damages, the defendants appeal against this award. Furthermore, SP6 and SD2 also confirmed that Rohgetana can eat like a normal child.

[73] Looking at the cases of *A'aliyah*, *Nurul Husna*, *Azim Muzammil* and *Hariesh Kumar*, I can safely conclude that added nutrition is a usual concern for children with cerebral palsy.

[74] Bearing in mind that Rohgetana was between the age of one day to 35 months old at this stage, she couldn't possibly have consumed so much nutrition (see tab 4 of the plaintiffs' bundle H). I am therefore of the view that an amount of RM250 per month is reasonable. The amount awarded by the Deputy Registrar is varied from RM17,500 to RM8,750.

(ii) Pre-trial Damages

[75] The pre-trial period calculated from the time the claim was filed until the Deputy Registrar made the award is 61 months. There defendants are appealing against seven awards made under this category which are as follows:

(a) the cost of medication;

(b) the cost of home visit physiotherapy;

(c) the cost of Ayurvedic therapy;

(d) the cost of travelling;

(e) the cost of care by family members;

(f) the cost of added nutrition; and

(g) the cost related to hygiene.

[76] The learned Senior Federal Counsel ("SFC") representing the defendants submitted that the principles of proving special damages applies for pre-trial damages. It is incumbent that the plaintiffs bear the burden of proving them on a balance of probability as held in the case of *Sam Wun Hoong v. Kader Ibramshah* (*supra*) and *Sathisvaran Chandrasegaran v. Agilan Vanmugelan & Anor* (*supra*).

Cost Of Medication (Pre-trial Damages)

[77] The plaintiffs claim for this item was RM6,000 being spasticity and influenza medications at the rate of RM100 per month.

[78] A sum of RM2,000 was awarded by the Deputy Registrar for cost of medication purchased for Rohgetana during this period.

[79] The defendants submitted that despite the plaintiffs furnishing receipts on this item, the plaintiffs were not entitled to this claim as the medication purchased were available at government clinics which were open 24 hours a day. The purchase of medication at private clinics and pharmacy was the plaintiffs' choice. Therefore the award should not have been made.

[80] I am of the view that the sum awarded by the Deputy Registrar is reasonable taking into account that it was over a period of 61 months.

Cost Of Home Visit Physiotherapy (Pre-trial Damages)

[81] The plaintiffs claim for this item was RM6,240. In support of this claim, the plaintiffs furnished receipts from pp. 52 to 66 of bundle C. SP4 was also called to testify wherein, she said that she conducted home visits for physiotherapy once a week for a period of 13 months at the rate of RM50 per visit. Total cost incurred was RM2,400.

[82] Having assessed the evidence before her, the Deputy Registrar awarded a sum of RM3,050 (RM50 x 61 months). The defendants are appealing on the ground that:

(i) the receipts were not marked as exhibits; and

(ii) based on the receipts the correct amount awarded should be RM650 (RM50 x 13 months)

[83] I disagree with the defendants' submission. Based on the testimony of SP4, she conducted home visits once a week for 13 months. Although challenged during cross examination, SP4 stood firm on the number of visits she made to the plaintiff's home. The Deputy Registrar also accepted her explanation as to the lack of bills issued by her. I am of the view that the decision in *ABDA Airfreight Sdn Bhd* (*supra*) clearly allows for oral evidence.

[84] Based on my calculations four visits per month x RM50 per visit x 13 months = RM2,600. The amount of RM3,050 calculated by the Deputy Registrar was based on 61 months. I therefore allow the claim of RM2,600. In my view, this amount is reasonable.

Cost Of Ayurvedic Therapy (Pre Trial Damages)

[85] A total of RM23,100 was awarded by the Deputy Registrar under this heading based on the following calculation:

RM50 per session for 21 sessions per month x 22 months= RM23,100

[86] Having heard the evidence given by PW3, the Deputy Registrar was of the view that the sum awarded was the actual sum expended (the plaintiffs had actually claimed for the rates to be calculated at the rate of RM110 per session on the basis that RM50 was a discounted rate).

[87] The defendants on the other hand submitted that based on the available receipts, only an amount of RM10,506.80 should be allowed. Bearing in mind that damages can be proven by way of both oral and documentary evidence and the fact that the Deputy Registrar had a first hand view of SP3's testimony, I decline to interfere with her award on this heading. The sum awarded is also reasonable as it is based on discounted rate and not on market rate.

Travelling Expenses (Pre-trial Damages)

[88] A sum of RM82,191.60 was awarded by the Deputy Registrar under this heading. This sum is divided as follows:

(a) RM39,491.60 as 50% cost of purchasing a Toyota Avanza vehicle for Rohgetana's traveling needs;

(b) RM42,700 being the cost of petrol calculated at the rate of RM700 per month x 61 months.

[89] The defendants submitted that since the vehicle was used by other family members to, only 1/3 of the cost of the vehicle and petrol ought to be awarded.

[90] It is my view that the award of 50% of the cost of the purchase of the Toyota Avanza vehicle is reasonable considering its price and practicality. The Toyota Avanza is also not a luxury vehicle. In assessing the petrol claim, the Deputy Registrar was satisfied that RM700 per month was explained by SP1 to be the amount used for Rohgetana's petrol needs. As the amount awarded is reasonable, there is no reason for me to interfere with this award (see *Nurul Husna*'s case).

Care By Family Members (Pre-trial Damages)

[91] A sum of RM500 per month was awarded by the Deputy Registrar for the cost of care by family members during this period on the same premise as the sum awarded for care by family members during the special damage period. The award under this heading added up to RM30,500.

[92] The defendants relying on their earlier submissions contended that the amount awarded was excessive as the purpose of awarding damages was not to enrich the plaintiffs but must be reasonable fair and adequate.

[93] At this stage, Rohgetana was between the age of 35 months old to 96 months old (two years 11 month to eight years old). I had earlier varied the same heading during the special damages period from RM500 per month to RM300 per month (see para. 68 above). For the same reasons, I am of the view that the sum of RM400 is more reasonable and appropriate. The award of RM30,500 by the Deputy Registrar is varied to RM24,400.

Cost Of Nutrition (Pre Trial Damages)

[94] A sum of RM500 was awarded by the Deputy Registrar under this heading. It amounts to a sum of RM30,050 (RM500 x 61 months).

[95] In support of their appeal on this ground, the defendants rely on their earlier submissions which is premised on the fact that Rohgetana can eat just like a normal child. That being the case she does not require additional nutrition.

[96] I hold a similar view as stated at para. 69 above. At this stage, Rohgetana has grown in size, meaning she can consume more nutrition. Taking into account the unchallenged testimony at pp. 30 & 49 of the CB and bundle C pp. 1 & 129, the documents furnished tab 4 of the plaintiffs' core bundle marked as "bundle H" and the fact that Rohgetana's condition has shown significant improvement, I am of the view that the award of RM350 per month for the cost of added nutrition is reasonable. The award of RM30,500 by the Deputy Registrar is varied to RM21,350.

Cost Of Hygiene Care (Pre-trial Damages)

[97] The Deputy Registrar awarded a sum of RM300 per month for hygiene care. This was based on the receipts as well as the oral testimony of the witnesses. The total amount awarded was RM18,300 (RM300 x 61 months).

[98] The defendants contend that the award is excessive. Based on the evidence adduced, the correct amount should be RM10,455.40.

[99] Plaintiffs have graciously agreed to the appeal by the Deputy Registrar on this item. I therefore revise the amount for hygiene expenses from RM18,300.00 to RM10,455.40 per month.

(iii) Future Damages

[100] For purposes of convenience, the defendants' appeal on this heading is categorised as follows:

> Category 1: Where the defendants accept the multiplicand but appeal only regarding the multiplier (Category 1);
>
> Category 2: Where the defendants appeal against both the multiplicand and the multiplier; and
>
> Category 3: The award for the cost of a computer to Rohgetana.

Category 1

[101] There are six headings under this category, which are as follows:

(i) the cost of future hospital admissions (amount awarded was RM1,333 (RM4,000 x 1/3) x 40 years= RM53,320);

(ii) the cost of future specialist consultations (amount awarded was RM60 (RM180 x 1/3) x 9 times a year x 40= RM21,600);

(iii) the cost of future medication (amount awarded was RM35 (100 x 1/3) x 12 x 40 = RM16,800);

(iv) the cost of future complementary treatment of hippo therapy and acupuncture (amount awarded for hippo therapy was RM400 x 12 x 40 = RM192,000 & for acupuncture RM600 x 40 = RM24,000);

(v) the cost of future special education (amount awarded RM1,000 (RM3,000 x 1/3) x 12 x 40 = 480,000); and

(vi) the cost of future assistive device (as per the following table which based on a multiplier of 40 years).

[102] The above headings concern the issue of multiplier that I have dealt with at paras. 24 and 34 above. Based on the multiplier of 28, the award by the Deputy Registrar is varied as follows:

(i) the cost of future hospital admissions

RM1,333 (RM4,000 x 1/3) x 28 years = RM37,324

(ii) the cost of future specialist consultations

RM60 (RM180 x 1/3) x 9 times a year x 28 = RM15,120

(iii) the cost of future medication

RM35 (100 x 1/3) x 12 x 28 = RM11,760

(iv) the cost of future complementary treatment of hippo therapy and acupuncture

RM400 x 12 x 28 = RM134,400 & for acupuncture RM600 x 28 = RM16,800);

(v) the cost of future special education (the deduction of 2/3 remains for the reasons given in para. 40 above)

RM1,000 (RM3,000 x 1/3) x 12 x 28 = RM336,000;

(vi) the cost of future assistive device from a lump sum of RM300,900 based on the multiplier of 40 years is reduced to RM231,500 based on a multiplier of 28 years; and

(vii) the award for further assistive device equipment such as air splint (RM6,400), postural walker/river walker (RM20,000) and gait trainer (RM22,000) is also reduced to RM4,800, RM12,500 and RM17,600 respectively.

Category 2

[103] There ten headings under this category, which are as follows:

(i) the cost of future surgery;

(ii) the pain & suffering and loss of amenities for future surgery;

(iii) the cost of future therapy;

(iv) the cost of future botox treatment

(v) the cost of Ayurvedic and stem cell treatment;

(vi) the cost of future care by maids;

(vii) the cost of future care by parents;

(viii) the cost of future hygiene;

(ix) the cost of future added nutrition; and

(x) the cost of future travelling

[104] Headings (i) to (iv) above, concerns the principle in *Chai Yee Chong*'s case (*supra*). The defendants urge this court to review the award made by the Deputy Registrar by only allowing 1/3 of the cost for each item. I have already dealt with the same issues at para. 24 and 34 above, and do not propose to repeat them here. It would be sufficient if I were to state my decision as follows:

(i) cost of future surgery:

Amount awarded: RM19,000

Reasonable: no increase nor deduction

(ii) cost for pain & suffering and loss of amenities for future surgery:

Amount awarded: RM30,000 is reasonable

No increase nor deduction.

(iii) the cost of future therapy:

Amount awarded: RM835,200 (RM1,740 x 12 x 40)

Variation due to change in multiplier:

RM1,740 x 12 x 28 = RM584,640

(iv) the cost of future botox treatment

Amount awarded: RM144,000

Amount after change of multiplier from 40 years to 28 years:

RM2,200 x 1/3 x 28 = RM20,533-33

Note: SP6 gave evidence that botox treatment is provided free in government hospital.

[105] As for items (v) to (x), the defendants is appealing against both the multiplier and the multiplicand. I shall deal with each item accordingly.

Item v: Future Ayurvedic And Stem Cell Treatment

[106] In so far as past expenses is concerned the Deputy Registrar awarded a sum of RM50 per session for Ayurvedic treatment. This was the discounted rate given by the therapist due to the financial difficulties faced by the first and second plaintiffs. The market rate is RM110.

[107] For future expenses, the Deputy Registrar awarded a sum of RM110 per session, based on the testimony of SP3 and SP6. The defendants were of the view that RM110 per session is excessive.

[108] The sum of RM110 reflects the actual market rate. Once the therapist knows that Rohgetana's parents have been awarded damages, the possibility of obtaining a discounted rate diminishes. In light of the fact that multiplier has been set at 28 years of age, the award under this item is as follows:

RM110 per session x 21 sessions per month x 12 months x 28 years = RM776,160

[109] The sum awarded for stem cell treatment was RM160,000 (RM4,000 per year x 40 years). The defendant was of the view that there is no evidence as to the effectiveness of this treatment on Rohgetana. That being the case, no award should have been made. In the alternative, the defendant was of the view that courts should only award 1/3 of the costs of this treatment based on a multiplier of 28 years.

[110] I agree with the award of 1/3 of the cost of this treatment as submitted by the defendants. The award is however varied due to the change in multiplier:

RM1335 (RM4000 x 1/3) x 28 years = RM37,380.33

Item vi: The Cost Of Future Care By Maids

[111] Under this heading, a sum of RM27,700 per year was awarded by the Deputy Registrar (including salary cost, permit and levy). The total award for a period of 40 years is RM1,108,000.

[112] The SFC was of the view that this amount is excessive as if the sum of RM27,700 is divided into 12 months, the cost of employing a maid per month would be RM2,308.30. This cost is equivalent to employ two maids.

[113] Having reviewed the submission of the defendants on this issue, I am of the view that the calculations submitted by the defendants for purposes of calculating the damages to be awarded failed to take into account the foreign

agency recruitment fee as well as the cost for providing food and medical care to the maid (as in the case of exh. D45 which is a print out from the Johor Immigration Department website).

[114] I am also of the view that the Deputy Registrar was correct in accepting the testimony of SP7 on this issue. Nonetheless, as I have reduced the multiplier from 40 years to 28 years, the award payable is RM27,700 x 28 years = RM775,600.

Item vii: The Cost Of Future Care By Parents

[115] A sum of RM500 per month awarded by the Deputy Registrar to the plaintiffs under this heading. As the multiplier used by the Deputy Registrar was 40 years, the total award amounted to RM240,000.

[116] I had earlier on reduced the award for cost of family care from RM500 to RM350 as Rohgetana's mother (the second plaintiff) was a full time housewife.

[117] As Rohgetana gets older and bigger in size, the need for extra care increases compared to the period where she was an infant-toddler-child. Although, with the assistance of a maid, the second plaintiff will still have to impart an extra amount of care as compared during a child's early formative years. As such, a sum of RM400 is reasonable which is in line with the authorities furnished by the defendants. The total award for this heading would be RM400 x 12 x 28 years = RM134,400.

Item viii: The Cost Of Future Hygiene

[118] For future hygiene, the Deputy Registrar awarded sum of RM300 per month. With a multiplier of 40 years, the total amount awarded was RM144,000.

[119] Base on the reasons given in para. 24 above and taking into account of the inevitable fact that as Rohgetana gets older, the cost of diapers also increases due to the increase of size of diapers used, I am of the view that the sum of RM300 per month is reasonable. Therefore the total award for this heading is RM300 x 12 months x 28 years = RM100,800.

Item ix: The Cost Of Future Added Nutrition; and

[120] The Deputy Registrar awarded a total sum of RM240,000 under this heading (RM500 per month x 12 x 40 years).

[121] I had earlier on reduced the amount of RM500 per month to RM250 and RM350 per month for the cost of nutrition (see paras. 72 and 94 above). However, as Rohgetana grows older and bigger, the need for further nutrition will also increase. Hence, an award of RM400 per month is reasonable.

[122] The multiplier used has also been reduced from 40 years to 28 years. In view thereof, the total award for this heading is RM400 x 12 x 28 = RM134,400.

Item x: The Cost Of Future Travelling

[123] Under this heading, the Deputy Registrar awarded a sum of RM826,000 based on the multiplier of 40 years. The amount is further divided as follows:

(a) RM 490,000 for the purchase of a van; and

(b) RM336,000 for petrol

[124] The defendants contend that the above amount is excessive and unreasonable.

[125] I am of the view that the Deputy Registrar was correct in assessing the lifetime of a motor vehicle at nine years as well as the cost of purchase of RM120,000 and modification cost of RM20,000. The deduction of 30% from the total gross award and the decision not to award any amount towards road tax and insurance is also correct. The award of RM700 per month for petrol is also correct.

[126] The defendants submission on the trade in value of RM10,000 for each time a new vehicle is purchased is disregarded as it is purely speculative.

[127] In view of the fact that the multiplier of 40 years is reduced to 28 years, the purchase of the vehicle is done four times only. As such, the award under this heading is as follows:

(a) cost of purchasing vehicle:

RM140,000 x 4 x 30% = RM350,000

(b) petrol cost

RM700 per month x 12 x 28 = RM235,200

(c) total for a + b = RM585,200

Category 3

[128] The Deputy Registrar awarded a sum of RM100,000 for the cost of purchasing a computer for Rohgetana.

[129] This was based on the recommendation of SP8 who stated that the use of a computer is not only for cognitive development but also involved physical movements. According to SP8, such a system would cost RM10,000 and would need to be updated every four years (note: this estimation is not supported by any documentation).

[130] According to SP6, Rohgetana is a suitable candidate for the use of a computer to assist her in learning to communicate due to the fact that she is able to comprehend. This was despite the fact that SP6 did not recommend

the computer system in her report. SP6 however said that due to the fact that Rohgetana's capability is equivalent to a one year old child she recommends that Rohgetana starts from a lower range and progress accordingly.

[131] I am unable to agree with the submission of the defendants on this point in saying that every family would be using a computer regardless of whether they have an OKU child or not. It is not the physical computer that is the main consideration. It is the software used for purposes of Rohgetana's rehabilitation.

[132] However, due to the change of multiplier from 40 years to 28 years, and taking into account SP6's testimony, the award for this heading is reduced to RM50,000.

The Defendants' Appeal On The Issue Of Rebate From Income Tax

[133] This ground of appeal is a non-starter as the award was given to Rohgetana and not to the first plaintiff which is her father. In fact, no award was given to the first plaintiff. This ground of appeal is therefore dismissed.

The Defendants' Appeal On The Issue Of Cost And Interest Awarded

[134] As far as the issue of costs is concerned, I am of the view that the amount of RM100,000 as getting fees and RM25,716.82 as out of pocket expenses awarded by the Deputy Registrar is reasonable.

[135] The assessment of damages hearing took a period of six days over a period of seven month. The hearing became protracted as the plaintiffs had to prove every single item claimed. In other words, there was no concession by the defendants on any item claimed.

[136] In both cases of *Thivya Ruban* and *Hariesh Kumar* (*supra*) the court awarded the sum of RM100,000 and RM120,000 respectively as getting fee for assessment proceedings. I am of the view that the Deputy Registrar had exercised her discretion correctly.

[137] On the issue of interest, the Deputy Registrar awarded:

(a) interest at 4% per annum on special damages from 19 November 2006 to the date of judgment on liability, 7 March 2012;

(b) interest at 8% per annum on pre-trial damages and general damages for pain & suffering and loss of amenities of life from the date of service of writ, 13 November 2008 to the date of judgment on liability, 7 March 2013; and

(c) interest at 5% per annum on the judgment sum from the date of judgment on liability, 7 March 2013 to date of payment.

[138] I am of the view that the Deputy Registrar had exercised her discretion to award interest to the plaintiffs within the permissible ambit of the law on each of the categories awarded. In this regard, the 8% per annum on pre-trial damages and general damages for pain & suffering and loss of amenities of life from the date of service of writ, 13 November 2008 to the date of judgment on liability, 7 March 2013 was in line with s. 11 of the Civil Law Act 1956.

See: *A matter of interest*, by Yeo Yang Poh, LLB (Hons) [1986] 2 MLJ clxxiii [BOA Tab 29]

See: Lim Heng Seng, *Assessment of Damages in Personal Injuries and Fatal Accident Claims: Principles and Practice*, at pp. 87 to 91 [BOA Tab 30]

[139] A summary of my decision on both the appeals by the plaintiffs and defendants can be found in the table annexed.

[140] On the issue of costs for these appeals, none was prayed for by both parties.